No. 96-595

Supreme Court, U.S.
FILED
NOV 15 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Appellant,

v.

JOE SHEA,

Appellee.

On Appeal From the United States District Court for the Southern District of New York

MEMORANDUM OF APPELLEE JOE SHEA IN OPPOSITION TO APPELLANT' S JURISDICTIONAL STATEMENT AND IN SUPPORT OF NOTING PROBABLE JURISDICTION

WAYNE H. MATELSKI
Counsel of Record
JAMES K. STRONSKI
JILL R. NEWMAN
ARENT FOX KINTNER
PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6000

PRESS OF BYRON S. ADAMS ♦ WASHINGTON, D.C. ♦ 1-800-347-8208

BEST AVAILABLE COPY

30 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

- Whether the on-line or digital press -- as represented here by Joe Shea as publisher of the *American Reporter* -- is entitled to the same First Amendment protections afforded the printed press and whether the Communications Decency Act unconstitutionally restricts these protections.

- Whether the Communications Decency Act is substantially overbroad and in violation of the First Amendment's right to freedom of speech because it bans constitutionally protected indecent communication between adults on the Internet, restricts speech that is not harmful to minors, regulates the democratic, noninvasive medium of the Internet, and/or overlooks less restrictive means to protect minors.

- Whether the Communications Decency Act's definition of indecency is unconstitutionally vague because it fails to give Internet users fair notice or a reasonable opportunity to know what communications are prohibited.

- Whether this Court should reject the Government's request to defer noting probable jurisdiction in this case because the record below raises important issues not raised below in the *ACLU* case.

TABLE OF CONTENTS

page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

ARGUMENT 4

I. THE COURT SHOULD REJECT THE GOVERNMENT'S REQUEST TO DEFER NOTING PROBABLE JURISDICTION 4

A. *Shea* Raises Important Issues Not Raised By *ACLU/ALA* 5

B. The *Shea* Record Includes Essential Evidence that Is Not in the *ACLU/ALA* Record 10

C. Given that the Well-Reasoned Decision in *Shea* Will Effectively Be on Appeal, Appellee Shea Should Have the Opportunity to Participate in the Briefing and Argument 13

page

II. THE INTERESTS OF EFFICIENCY AND FAIRNESS FAVOR CONSOLIDATING THIS CASE WITH *ACLU/ALA* 14

CONCLUSION 16

APPENDIX 1a

TABLE OF AUTHORITIES

page

CASES

Abrams v. Johnson/United States v. Johnson, 116 S. Ct. 1823 (1996) 15

Action for Children's Television v. FCC, 58 F.3d 654, 668-69 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996) 7-8

American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), appeal pending, No. 96-511 4

Bush v. Vera/United States v. Vera, 115 S. Ct. 2639 (1995) 15

Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) 6

Group W. Cable, Inc. v. Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987) 7

Legi-Tech, Inc. v. Keiper, 766 F.2d 728 (2d Cir. 1985) 6

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 7, 9

page

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) 8

Papish v. Board of Curators of University of Missouri, 410 U.S. 667 (1973) 8

Reno v. Bossier Parish Sch. Bd./ Price v. Bossier Parish Sch. Bd., 116 S. Ct. 1874 (1996) 14-15

Turner Broadcasting Sys., Inc. v. FCC, 114 S.Ct. 2445 (1994) 8

United States v. Eichman, 496 U.S. 310 (1990) 14

CONSTITUTION AND STATUTES

U.S. Const., Amend. I . . . . . *passim*

Telecommunications Act of 1996, Pub. L. No. 104-104, Tit. V, 110 Stat. 56 (Communications Decency Act of 1996) 1
§ 502, 110 Stat. 133 . . . . . 1, 2
47 U.S.C. 223(d) . . . . . *passim*
47 U.S.C. 223(d)(1) 2, 3
47 U.S.C. 223(d)(2) 2
47 U.S.C. 223(e) 13
§ 561(b), 110 Stat. 143 1

28 U.S.C. 1253 1

OPINION BELOW

The decision of the three-judge district court in *Shea v. Reno* is reported at 930 F. Supp. 916 (S.D.N.Y. 1996) and appended to the Jurisdictional Statement Appendix ("J.S. App.") at 1a-75a.

JURISDICTION

The judgment of the district court was entered on July 29, 1996. A notice of appeal was filed on August 15, 1996. Appellant's Jurisdictional Statement was filed on October 15, 1996. The jurisdiction of this Court is invoked under Section 561(b) of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 143, and 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Section 502 of the Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, is appended at J.S. App. 78a-85a.

INTRODUCTION

The Government appeals from a preliminary injunction enjoining enforcement of section 502(2)(d) of the Communications Decency Act of 1996, codified as 47 U.S.C. 223(d) (the "CDA"). The CDA criminalizes the communication of "indecent" or "patently offensive" material over the Internet if such material is made available to minors. 47 U.S.C. 223(d)(1). The penalty is up to two years' imprisonment and/or a $250,000 fine. 47 U.S.C. 223(d)(2).

The Internet is a global network of private and public computers that has revolutionized communications. Individuals wishing to access the Internet must obtain a connection, which is available from many schools, universities and commercial service providers worldwide.

The Internet is believed to connect at least 50,000 computer networks linking some nine million host computers in ninety countries. J.S. App. at 11a. An estimated 40 million people communicate on the Internet, and use of this burgeoning network is doubling every 9-12 months. (Joint Stipulations of Parties in District Court ("Joint Stip.") at ¶ 3; Shea's Response to the Government's Requests For Admissions (Plaintiff's Hearing Exhibit 25).) By the year 1999, the number of people using the Internet is expected to reach 200 million. (Joint Stip. at ¶ 3.)

Joe Shea is editor-in-chief, part-owner, and publisher of the *American Reporter,* a daily electronic newspaper published and distributed over the Internet. The *American Reporter* is a general interest newspaper, covering politics, international affairs, and economic, social and cultural issues. About forty writers and news services contribute stories and editorials. Several hundred individuals and businesses

subscribe to the paper, including reporters from about 25 newspapers, the Associated Press, and other news services. Subscribers receive the newspaper by electronic mail ("e-mail"). The *American Reporter* is simultaneously published and made available through the Internet on the World Wide Web (the "Web") to any person in the world possessing both an Internet connection and widely available browsing software to access materials on the Web. Accordingly, there is no way for Joe Shea or other publishers similarly situated to know the age of those individuals who access the articles published by the *American Reporter*.

On February 8, 1996, the day the Telecommunications Act of 1996 was signed into law, the *American Reporter* published an editorial on the CDA (appended, *infra*, at 1a-7a). The editorial contained numerous terms that may constitute "indecent" language under 47 U.S.C. 223(d)(1) of the CDA and subject Shea and the *American Reporter* to criminal prosecution.

The CDA, if enforced against on-line or digital publishers in general, and Shea in particular, would have a devastating effect on freedom of the press and speech on the Internet. The on-line press is a vibrant, new way for individuals to distribute news and editorial opinions worldwide -- essentially forming an army of small "citizen publishers." This case is about ensuring that these "citizen publishers" enjoy the same constitutional protections enjoyed by their counterparts in the print media.

ARGUMENT

I. THE COURT SHOULD REJECT THE GOVERNMENT'S REQUEST TO DEFER NOTING PROBABLE JURISDICTION

The Government does not and cannot suggest that this Court lacks jurisdiction in this case. Instead, without citation, it makes the unusual request that the Court "hold this case and dispose of it as appropriate in light of its decision in [*Reno v. American Civil Liberties Union*, appeal pending, No. 96-511] ("*ACLU/ALA*" or the "Philadelphia case") (" (Government's Jurisdictional Statement at 12). The Government argues that the consolidated case heard by a three-judge panel of the Eastern District of Pennsylvania in *ACLU/ALA*, represents a broad range of plaintiffs and that the opinion in that case (*American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996)) encompasses all of the legal issues raised in both cases. In short, the Government's position is that there is little benefit to considering the record and well-reasoned opinion in *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996) *("Shea")* in addressing the questions raised in these related cases.

The Government's reasoning is flawed for at least three reasons. First, the *Shea* case raises legal issues not argued in the Philadelphia case. Second, the record in *Shea* includes admissions by the Government, as well as expert testimony and other evidence regarding the on-line press and the nature of various Internet communities that were not presented in *ACLU/ALA*. Third, the well-reasoned *Shea* opinion has already been relied upon by both the Government and the *ACLU/ALA* appellees in their briefs and thus will likely be considered by this Court.

Under the present circumstances, the practical effect of "holding" the *Shea* case pending disposal of *ACLU/ALA* would be that the *Shea* case will be *de facto* on appeal before this Court without the benefit of the full record in *Shea* or the opportunity to question Shea's counsel at oral argument. And, most importantly, appellee Shea himself would be denied the opportunity to defend the result in his case -- a result that allows him to exercise his First Amendment rights free of the threat of criminal prosecution.

A. *Shea* Raises Important Issues Not Raised By *ACLU/ALA*

While it is true, as the Government notes, that *many* of the legal issues raised in this case were raised in *ACLU/ALA*, appellee Shea raised a significant legal argument not addressed in the Philadelphia case: whether the CDA violates the free press rights of a newspaper that publishes on-line. This issue is significant in this appeal because it presents an additional ground to affirm the decision below and invalidate the CDA. This Court would not have a record below to review the free press issues if it grants the Government's request to hold *Shea* in abeyance.

The free press issues were briefed and argued on a full record in *Shea*. Indeed, the *Shea* case, where an "indecent" political commentary on the CDA published first in the *American Reporter* was later published in *Harpers* magazine, squarely presents the First Amendment freedom of the press issues for decision. By contrast, the *ACLU/ALA* appellees did not even brief the free press issue below. The fact that the ACLU and ALA appellees may include members of the on-line press does not, by itself, raise or preserve this independent legal ground to invalidate the CDA.

In the proceedings before the three-judge panel of the Southern District of New York, appellee Shea argued that the CDA is facially invalid because it violates the right to a free press. Shea emphasized that the Government has no legitimate, let alone compelling, interest in protecting children from hearing news reports or political commentary, based solely on allegedly indecent language used.

The novel issue here is whether the on-line or digital press is entitled to the same First Amendment protections afforded print news providers. Lower federal courts have held that the emerging on-line press is entitled to such protection. For example, in *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), the district court held:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.

Id. at 140.

Similarly, in *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985), the Second Circuit held that a commercial database providing legislative material on-line was entitled to protection under the First Amendment's freedom of the press provisions. The court also observed that "[i]t is even now technologically possible to offer an 'electronic newspaper' to subscribers who own personal computers." *Id.* at 732.

In sum, the Internet is a "virtual" excursion to the book store, library or newspaper stand. Therefore, appellee Shea argued below that the *American Reporter* on the Internet should not be viewed differently than, for instance, the *New York Times* at a newsstand. This Court should note probable jurisdiction here to consider this issue -- an issue not raised in *ACLU/ALA*.

In addressing the rights of the printed press, courts have long recognized that the press is entitled to broad protection from government interference. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *see also Group W. Cable, Inc. v. Santa Cruz*, 669 F. Supp. 954, 960 (N.D. Cal. 1987). In *Miami Herald*, this Court struck down a Florida statute that compelled newspapers to grant political candidates the right to equal space to reply to press criticism. The Court stated that "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." 418 U.S. at 256. Moreover, the Court stated that the choice of material to go into a paper constituted the exercise of editorial control and judgment and "[it] has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press." 418 U.S. at 258.

For this and other reasons, including the need to report news accurately, the Government has never subjected the print media to the censorship that the CDA thrusts upon newspapers that publish on the Internet. And there is simply no rational basis to apply restrictions to on-line newspapers that may not be applied to a printed newspaper that is delivered to the homes of subscribers (including children) and sold in newsstands. *See Action for Children's Television v. FCC*, 58 F.3d 654, 668-69 (D.C. Cir. 1995), *cert. denied*, 116

S. Ct. 701 (1996), where the D.C. Circuit found there was no rational basis to apply less strict regulations to public stations than to commercial stations.

Enforcement of the CDA would have the absurd result of requiring newspapers such as the *New York Times* and the *Wall Street Journal* to publish an unregulated version on paper and a censored version on the Internet. Indeed, many news stories and political commentaries could not be accurately reported without the use of indecent words. *See, e.g., Papish v. Board of Curators of University of Missouri,* 410 U.S. 667 (1973) (individual cannot be punished for printing word "mother-fuckers" to report on a gang by that name). Examples include the tapes of former President Richard Nixon and, more recently, the Unabomber's Manifesto. In the instant case, the editorial published by plaintiff Shea's *American Reporter* -- likely in violation of the indecency statute -- is decidedly political speech. It uses indecent speech, *i.e.,* patently offensive language describing sexual and excretory activities and organs, to argue that the CDA violates the First Amendment and to criticize the legislators who voted to pass that law. *See, infra,* 1a-7a.

In addition, appellee Shea argued below that the CDA violates First Amendment guarantees of a free press because it specifically targets only the on-line or digital press -- a relatively small, but growing, segment of the press that is likely to represent editorial viewpoints uncharacteristic of the traditional press and the media conglomerates. *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 591-593 (1983); *see also Turner Broadcasting Sys., Inc. v. FCC,* 114 S.Ct. 2445, 2468 (1994).

Significantly, it is the targeted group here -- the on-line digital press -- that requires greater First Amendment

protection to foster its growth. As this Court has long recognized, the concentration of media power and the elimination of competing newspapers in many geographic areas has had an adverse effect on the press. Recognizing the high barriers to entry facing new members of the press, this Court has noted "[t]he First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market." *Miami Herald*, 418 U.S. at 251. The Court further stated:

> Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics.

Id. at 251 n.17 (quoting A. MacLeish in W. Hocking, *Freedom of the Press* 99 n. 4 (1947)). The availability of digital newspapers over the Internet means that these financial, economic and technological barriers have been largely overcome by this communications revolution.

The CDA's censorship of indecent language not only violates basic First Amendment guarantees of press freedom, it targets the digital press -- a segment of the press that has infused new vitality and further democratized the marketplace for information. This provides an additional reason for this Court to affirm the decision below invalidating the CDA.

If the Court declines to exercise probable jurisdiction, these free press issues and the record on these issues will not be before the Court because, again, they were simply not presented in *ACLU/ALA*.

B. The *Shea* Record Includes Essential Evidence that Is Not in the *ACLU/ALA* Record

In addition, if this Court holds this case in abeyance, the Court would not have before it the full record in *Shea*, which includes important evidence not in the record in *ALCU/ALA*. The CDA has been declared unconstitutional by two separate three-judge district courts based upon two separate records developed before those courts. By agreement of the parties in the *Shea* case, much (but not all) of the record in the *ACLU/ALA* case was entered into evidence in *Shea*. However, because the evidentiary hearings in *Shea* occurred after the evidentiary hearings in *ACLU/ALA*, new and essential evidence implicating the constitutionality of the CDA was introduced into the record in *Shea*.

In this Court, the Government has requested that the Court note probable jurisdiction in the *ACLU/ALA* case and hold in abeyance the probable jurisdiction determination in *Shea*. Yet to do so would mean that this Court would not have the benefit of the new evidence introduced in *Shea* and thus the Court would determine the constitutionality of the CDA based upon an incomplete evidentiary record. If one case is to be held in abeyance, appellee Shea submits that that case should be *ACLU/ALA* rather than *Shea*, because this Court would then have before it the more recent record as developed below.

Some examples of the evidence in the record in *Shea* that are not in *ACLU/ALA* are demonstrative. There is, first of all, the expert testimony of Clay Shirky. (*See* Declaration of Clay Shirky, Supplemental Declaration of Clay Shirky, and Hearing Tr. at 231-292.) Mr. Shirky has studied and written extensively on the Internet, focusing primarily on how people communicate on the Internet. One of his books, entitled *Voices From The Net* and published in 1995 (Plaintiff's Hearing Ex. 24), examines how the Internet's unique communications capabilities have been used and influenced by different communities of users. These communities have been formed based upon shared common interests in the Internet's many different kinds of electronic spaces, including mailing lists, bulletin boards or newsgroups, real time "chat rooms," multiplayer games, and the Web. Mr. Shirky's testimony and his book, both part of the full record in *Shea*, explain the nature of communication in these differing electronic spaces and how enforcement of the CDA would have a chilling effect on free expression in these Internet communities.

Moreover, Mr. Shirky in his testimony distinguished Internet communication from other media on the basis of how people use the media. Unlike more traditional media like television and radio, the Internet, according to Mr. Shirky, can be understood to be largely "pull-based." Thus, information accessed on the Internet -- and especially on the Web -- must be searched for and retrieved by the user. The information on the Internet is hence not "pervasive." Mr. Shirky's insights into how the Internet works provided the court below with vital information on this medium, how it differs from other media, and why regulatory models that might be appropriate to other media are unworkable when applied to the Internet.

Mr. Shirky's testimony and exhibits also focused on how people actually communicate every day, in large and growing numbers, in this medium. Thus, his testimony was critical for the court below to understand the effect the CDA would have on the First Amendment rights of these people.

In addition, the *Shea* record includes evidence from appellee Shea himself, that dramatically demonstrated the chilling and discriminatory effect of the CDA on small publishers and the self censorship created by the CDA. Again, his evidence also is not in the *ACLU/ALA* record. First, the editorial, which first appeared in the *American Reporter* (Plaintiff's Hearing Ex. 16), and then in *Harpers Magazine* (Plaintiff's Hearing Ex. 17), (reproduced *infra* at 1a-7a) was a key piece of evidence in *Shea*. Moreover, appellee Shea testified about being a representative of the "citizen publishers" who are watching to see what the courts will do with the CDA. Mr. Shea distributes the *American Reporter* with almost no overhead. Given his limited financial resources, he, like most "citizen publishers," can little afford to defend himself against government prosecution. Indeed, Shea testified that enforcement of the CDA would severely restrict his coverage of stories that might involve the use of indecent language and force him to edit and publish the *American Reporter* in a manner different than if he were editing or publishing a print publication. (*See* Declaration of Joe Shea at ¶ 16.)

In fact, a dramatic example of evidence in *Shea* that is not in *ACLU/ALA* was the *Government's* demonstration on the use of the Internet. During this demonstration, one of the sites that was accessed by the Government's witness apparently had been closed down because of the threat of a CDA prosecution. (Hearing Tr. at 421-22.)

Furthermore, the parties in *Shea* exchanged requests for admissions, and the Government made admissions not included in the *ACLU/ALA* record. For example, at oral argument, the Government conceded that, without the safe harbor defenses, the CDA is unconstitutional. *See Shea*, J.S. App. at 52a. This key concession was not made by the Government in *ACLU/ALA*, and thus the ACLU cites to *Shea* to make this point. *See* ACLU Motion To Affirm at 16. The *Shea* record also includes a May 3, 1996 letter from John c. Keeney, Acting Assistant Attorney General, Criminal Division, Department of Justice, to the three-judge court in *Shea*, responding to the court's questions about the intended scope and application of the defenses to the CDA, codified as 47 U.S.C. 223(e).

In sum, if this Court grants the Government's unusual request to defer noting probable jurisdiction in this case, the Court will lose the benefit of having the *Shea* record before it. The Court thus will not have the evidence developed below designed to demonstrate how the CDA would unconstitutionally censor a new and vibrant sector of the press accessible now to "citizen publishers" with little capital and with unorthodox editorial views.

C. Given that the Well-Reasoned Decision in *Shea* Will Effectively Be on Appeal, Appellee Shea Should Have the Opportunity to Participate in the Briefing and Argument

Both the government's jurisdictional statement and the ACLU's summary affirmance motion cite extensively to the opinion and record in the *Shea* case. In total, the parties cited to the *Shea* case fifteen times, including use of quotes from the *Shea* decision in their substantive arguments. *See*

Jurisdictional Statement in *ACLU/ALA* at 3, 19, 22, 23, 24; ACLU Motion to Affirm at 2, 16, 24, 25, 28; ALA Response to the Government's Jurisdictional Statement at 3, 16, 20, 21.

If the Court defers its probable jurisdiction determination in this case and hears the appeal in *ACLU/ALA*, appellee Shea submits that the decision in his case will effectively be on appeal without his involvement and without the benefit of having the record below before this Court. This Court would be deciding the issues in *Shea* without an opportunity to review the record, the benefit of the perspectives and issues appellee Shea brings to the legal arguments, or the ability to examine appellee Shea's counsel at oral argument. As for Joe Shea himself, he would be denied the opportunity to participate in an appeal which could result in criminalizing his conduct, subjecting him to fines and imprisonment.

II. THE INTERESTS OF EFFICIENCY AND FAIRNESS FAVOR CONSOLIDATING THIS CASE WITH *ACLU/ALA*

Appellee Shea respectfully moves this Court to consolidate this case with *ACLU/ALA* pursuant to Supreme Court Rule 27.3. In deciding whether to hear appeals in related cases out of different courts, this Court has commonly noted probable jurisdiction in both cases and consolidated the cases for argument. In fact, the Court has consolidated cases procedurally and substantively similar to this one. For example, this Court noted probable jurisdiction and consolidated appeals from two district courts that had ruled that the Flag Protection Act of 1989 violated the First Amendment. *United States v. Eichman*, 496 U.S. 310, 312-13 (1990). Other recent examples of cases consolidated by this Court include *Reno v. Bossier Parish Sch. Bd.* and *Price*

v. Bossier Parish Sch. Bd., 116 S. Ct. 1874 (1996); *Abrams v. Johnson* and *United States v. Johnson*, 116 S. Ct. 1823 (1996); and *Bush v. Vera* and *United States v. Vera*, 115 S. Ct. 2639 (1995).

Indeed, here, consolidation is the most efficient, as well as the fairest, way for the Court to review the issues raised in these related cases. Consolidation would impose no additional burden of the Court or any of the parties. Instead, consolidation would enable the Court to review a full record and consider all issues in one appeal and allow all plaintiffs below to participate in that appeal. Furthermore, appellee Shea raises issues of considerable constitutional importance and of great global interest to the growing number of "citizen publishers" and speakers using the Internet in this country and abroad.

For these reasons, as well as the other reasons stated above, Shea respectfully submits that the Court should note probable jurisdiction in both *Shea* and *ACLU/ALA* and consolidate these related cases for review.

CONCLUSION

For the reasons stated above, appellee Joe Shea respectfully requests that the Court (i) deny the Government's request that the notation of probable jurisdiction be deferred pending determination of the *ACLU/ALA* case; (ii) note probable jurisdiction in *Shea;* and (iii) consolidate this case with the *ACLU/ALA* case.

Respectfully submitted,

Wayne H. Motelski
Counsel of Record
James K. Stronski
Jill R. Newman
Arent Fox Kintner
Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6000

Counsel for Appellee Joe Shea

November 15, 1996

APPENDIX

APPENDIX

COMMENTARY: COMMUNICATIONS DECENCY ACT
by Steve Russell
American Reporter Correspondent San Antonio, Texas
2/6/96 censorship free

THE X-ON CONGRESS: INDECENT COMMENT ON AN INDECENT SUBJECT
by Steve Russell
American Reporter Correspondent

SAN ANTONIO, Texas - You motherfuckers in Congress have dropped over the edge of the earth this time. I understand that very few of the swarm of high dollar lobbyists around the Telecommunications Bill had any interest in content regulation -- they were just trying to get their clients an opportunity to dip their buckets in the money stream that cyberspace may become -- but the public interest sometimes needs a little attention. Keeping your eyes on what big money wants, you have sold out the First Amendment.

First, some basics. If your children walked by a public park and heard some angry sumbitches referring to Congress as "the sorriest bunch of cocksuckers ever to sell out the First Amendment" or suggesting that "the only reason to run for Congress these days is to suck the lobbyists' dicks and fuck the people who sent you there," no law would be violated (assuming no violation of noise ordinances or incitement to breach the peace). If your children did not wish to hear that language, they could only walk away. Thanks to your heads-up-your-ass dereliction

of duty, if they read the same words in cyberspace, they could call the FBI!

Cyberspace is the village green for the whole world. It is the same as the village green our Founders knew as the place to rouse the rabble who became Americans, but it is also different. Your blind acceptance of the dubious -- make that dogass dumb -- idea that children are harmed by hearing so-called dirty words has created some pretty stupid regulations without shutting down public debate, but those stupid regulations will not import to cyberspace without consequences that even the public relations whores in Congress should find unacceptable.

In cyberspace, there is no time. A posted message stays posted until it is wiped. Therefore, there is no way to indulge the fiction that children do not stay up late or cannot program a VCR.

In cyberspace, there is no place. The "community standards" are those of the whole world. By trying to regulate obscenity and indecency on the Internet, you have reduced the level of expression allowed consenting adults to that of the most anal retentive blueballed fuckhead U.S. attorney in the country. The Internet is everywhere you can plug in a modem. Call Senator Exon an "Ignorant motherfucker" in Lincoln, Nebraska and find yourself prosecuted in Bibleburg, Mississippi.

In cyberspace, you cannot require the convenience store to sell Hustler in a white sleeve. The functional equivalent is gatekeeper software, to which no civil libertarian has voiced any objection. Gatekeeper software

cannot be made foolproof, but can you pandering pissants not see that any kid smart enough to back into a Website is also smart enough to get his hands on a hard copy of Hustler if he really wants one?

In cyberspace, there is the illusion of anonymity but no real privacy. It is theoretically possible for an Internet server to seine through all messages for key words (although it seem likely the resulting slowdown would be noticeable). Perhaps some of you read about America On Line's attempt to keep children from reading the word "breast?" An apparently unforeseen consequence was the shutdown of a discussion group of breast cancer survivors. Don't you think more kids are aware of "teat" (pronounced "tit") than of "breast?" Can skirts on piano legs, er, limbs be far behind?

But silly shit like this is just a pimple on the sea of long-term consequences for politics, art and education. You have passed a law that will get less respect that the 55 m.p.h. speed limit dead bang in the middle of the First Amendment. Indecency is nothing but a matter of fashion; obscenity is the same but on a longer timeline. This generation freely reads James Joyce and Henry Miller and the Republic still stands. The home of the late alleged pornographer D.H. Lawrence is now a beautiful writers' retreat in the mountains above Taos, managed by the University of New Mexico.

Universities all have Internet servers, and every English Department has at least one scholar who can read Chaucer's English -- but not on the Internet anymore. Comparative literature classes might read Boccaccio -- but

not on the Internet anymore. What if some U.S. Attorney hears about Orthello and Desdemona "making the beast with two backs" -- is interracial sex no longer indecent anywhere in the country, or is Shakespeare off the Internet?

Did you know you can download video and sound from the Internet? Yes, that means you can watch other people having sex if that is interesting to you, live or on tape. Technology can make such things hard to retrieve, but probably not impossible. And since you have swept right past obscenity and into indecency, the baby boomers had better keep their old rock 'n roll tapes off the Internet.

When the Jefferson Airplane sang "her heels rise for me," they were not referring to a dance step. And if some Brit explains the line about "finger pie" in Penny Lane, the Beatles will be gone. All of those school boards that used to ban "The Catcher in the Rye" over cussing and spreading the foul lie that kids masturbate can now go to federal court and get that nasty book kept out of cyberspace.

But enough about the past. What about rap music? No, I do not care much for it either -- any more than I care for the language you shitheads have forced me to use in this essay -- but can you not see the immediate differential impact of this law by class and race? What is your defense -- that there are no African-Americans on the Internet, since they are too busy pimping and dealing crack? If our educational establishment had any sense at all, they will be trying to see more teens of all colors on the Internet, because there is a lot to be learned in cyberspace that has nothing to do with sex.

There are plenty of young people in this country who have legitimate political complaints. When you dickheads get done with Social Security, they will be lucky if the retirement age is still in double digits. But thanks to the wonderful job the public schools have done keeping sex and violence out, we have a lot of intelligent kids who cannot express themselves without indecent language. I have watched lawyers in open court digging their young clients in the ribs every time the word "fuck" slipped out.

Let's talk about this fucking indecent language bullshit. Joe Shea, my editor, does not want it in his newspaper, and I respect that position. He might even be almost as upset about publishing this as I am about writing it. I do use salty language in my writing, but sparingly, only as a big hammer. Use the fucking shit too fucking much and it loses its fucking impact - see what I mean? Fiction follows different rules, and if you confine your fiction writing to how the swell people want to see themselves using language, you not only preclude literary depiction of most people but you are probably false to the people you purport to depict.

Do you remember how real language used by real people got on the air and in the newspapers? Richard Nixon, while he was president, speaking in the White House about official matters. A law professor and a nominee for Supreme Court Justice arguing about pubic hairs and porno movies during Senate hearings. Are these matters now too indecent for the Internet? How much cleansing will be required of the online news services? Answer: Enough cleansing to meet the standard of what is appropriate for a child in the most restrictive federal judicial district.

This is bullshit -- unconstitutional bullshit and also bad policy bullshit. To violate your ban on indecency, I have been forced to use and overuse so-called indecent language. But if I called you a bunch of goddam motherfucking cocksucking cunt-eating blue-balled bastards with the morals of muggers and the intelligence of pond scum, that would be nothing compared to this indictment, to wit: you have sold the First Amendment, your birthright and that of your children. The Founders turn in their graves. You have spit on the grave of every warrior who fought under the Stars and Stripes.

And what mess of pottage have you acquired in exchange for the rights of a free people? Have you cleansed the Internet of even the rawest pornography? No, because it is a worldwide system. You have, however, handed the government a powerful new tool to harass its critics: a prosecution for indecent commentary in any district in the country.

Have you protected one child from reading dirty words? Probably not, if you understand what the economists call "substitution" -- but you have leveled the standards of political debate to a point where a history buff would not dare to upload some of the Federalist v. Anti-Federalist election rhetoric to a Website.

Since the lobby reporting requirements were not law when the censorship discussion was happening, I hope you got some substantial reward for what you gave up. Thirty pieces of silver doesn't go far these days.

(Steve Russell, retired after 16 years as a trial judge in Texas, is Assistant Professor of Criminal Justice at the University of Texas in San Antonio.)

This article may be reproduced free forever.